MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Room 433
Washington, DC 20006
202 887 3040
Fax 202 887 2772

Kecia Boney
Senior Regulatory Counsel
Local Markets and Enforcement

September 28, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Errata - Comments of MCI WorldCom, Inc.,
Deployment of Wireline Services Offering Advanced Telecommunications
Capability, CC Docket No. 98-147

Dear Ms. Salas:

Enclosed is a corrected copy of Comments, originally filed on September 25, 1998, by MCI WorldCom, Inc. (MCI WorldCom) in the above-captioned proceeding. MCI WorldCom experienced significant computer problems when trying to merge sections of the Comments received from other offices, which resulted in corruption of the document's format. The attached Comments do not contain any substantive changes. Also enclosed is a Table of Contents, which was inadvertently omitted.

If you have any questions, please feel free to contact the undersigned.

Sincerely,

Kecia Boney

Kecia Boney

cc: ITS

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
	)	

COMMENTS OF MCI WORLDCOM, INC.

Kecia Boney
Dale Dixon
Lisa Smith
1801 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 887-3040

Of Counsel:

Anthony Epstein
Mark Schneider
Jeffery I. Ryen
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 2005
(202) 639-6000

Catherine R. Sloan
David N. Porter
Richard L. Fruchterman III
Richard S. Whitt
1120 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 776-1550

Kevin Sievert
Glen Grochowski
400 International Parkway
Richardson, TX 75081

Dated: September 28, 1998

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In MCI WorldCom's view, there is no statutory policy basis for exempting ILECs from their obligations under section 251(c) when they provide advanced services via a nominally separate affiliate that is not treated as an ILEC itself. It would violate the statutory prohibition against forbearance from the requirements of section 251(c) until the requirements of the section are fully implemented. The Commission has recognized that it lacks legal authority to forbear from applying sections 251(c) and 271 to the provision of advanced services by ILECs.

The ILEC affiliate contemplated in the Commission's proposal, even if nominally separate from the ILEC, would be a "successor" or "assign" comparable in function and purpose, and thus subject to section 251(c). In section 251(h), Congress prevented evasion of the requirements of 251(c) and the forbearance limitation in section 10(d) by defining "incumbent local exchange carriers" subject to section 251(c) to include (1) any "successor or assign" and (2) any carrier that occupies a comparable position in the local market, that substantially replaced the ILEC, and for which ILEC treatment is consistent with the public interest. Moreover, section 251(h) should be interpreted consistent with the Commission's long-standing policy of prohibiting companies from frustrating a congressional or regulatory policy by manipulating their corporate form.

Nonetheless, should the Commission decide -- incorrectly -- to adopt its ILEC "advanced services affiliate" proposal, such an affiliate must be structured to be as "truly separate" as possible. In MCI WorldCom's view, nothing short of a total divestiture will strip the affiliate of its privileged position in the local market, and fully protect the interests of captive ILEC ratepayers.

In the absence of total divestiture, the Commission must endeavor to adopt requirements and safeguards to create as complete a separation between the ILEC and its advanced services affiliate as possible. Neither Section 272 of the 1996 Act, nor the FCC's Non-Accounting Safeguards Order, offer adequate safeguards to protect competitors and consumers from discriminatory ILEC behavior. Instead, the Commission must strengthen considerably its proposed list of seven criteria (including complete operational independence, "arm's length" transactions, blanket prohibition on ILEC discrimination, and full applicability of interconnection and UNE obligations to the ILEC) to create a wall of separation between the ILEC and its affiliate. MCI WorldCom also urges the adoption of additional separation requirements and nondiscrimination safeguards to flesh out the "truly separate" standard, including (1) requiring the affiliate to submit operating plans for mandatory FCC approval; (2) limiting the affiliate to providing only "advanced telecommunications services;" (3) compelling the affiliate to allow equal access to competing ISPs' services; (4) requiring the ILECs to file detailed performance and quality of service reports; and (5) declining to adopt any sunset dates.

MCI WorldCom does not support automatically classifying all advanced services affiliates as nondominant carriers, freeing them from a host of pricing and other regulations. Instead, the Commission should require each affiliate, on a case-by-case basis, to demonstrate that it meets every aspect of the Commission's "truly separate" criteria, as well as the traditional criteria for nondominance, including showing the presence of significant competition in the local market.

Consistent with the Non-Accounting Safeguards Order, MCI WorldCom believes that a

wholly-owned ILEC affiliate should be deemed an assign of the ILEC in any instance where it receives facilities, equipment, or other assets, gains exclusive use of ILEC infrastructure, or obtains services from the ILEC not available to independent CLECs. No CLEC would ever be in the position of receiving a similar transfer of ILEC elements, services, or facilities. Such transfers would give the affiliate a critical first mover advantage, with significant monopoly-based economies of scale and scope that are unavailable to its competitors. The Commission must, at the very least, require imputation of all pertinent costs.

Congress understood that it was critical that competitors be able to collocate "equipment necessary for interconnection or access to unbundled network elements" on "reasonable and nondiscriminatory" terms. While there is no technical necessity for collocation, CLECs, for a variety of reasons, may choose to collocate additional equipment necessary to provide advanced services. MCI WorldCom nevertheless endorses the Commission's proposal to adopt national collocation rules to ensure that competitors who wish to provide their own facilities at ILEC central offices are able to do so. The Commission's proposed alternatives, shared collocation cages, cageless collocation and collocation cage sizes with no minimum requirements, would indeed facilitate deployment by assuring more CLECs the ability to collocate and gain access unbundled local loops. The Commission must also clarify that all equipment necessary to provide local services, advanced or traditional, may be collocated. Any restrictions on the types of equipment that can be collocated can precludes CLECs from using vendors of their choice or, force CLECs to use a particular vendor.

To limit to the greatest extent possible the delay and regulatory gamesmanship that has largely thwarted facilities-based competition to date, the Commission also should list precisely

those network elements that are necessary for the provision of advanced telecommunications services, including copper loops, fiber loops, OSS, switching facilities, and network enhancements such as DSL modems. In particular, the FCC should make clear that ILECs must work with CLECs and the standards bodies to develop an electronic OSS that enables competitors to determine whether the loop is capable of supporting DSL equipment. CLECs should be able to ascertain as to every local loop: (1) whether the loop passes through a remote terminal, (2) whether it includes any attached electronics, (3) the condition and location of the loop, (4) loop length, and (5) electrical parameters of the loop.

The Commission's current definition of the loop is insufficient to ensure that CLECs will have access to the loop functionality they need to offer advanced services, such as DSL-based services. The following loop configurations should be made available as network elements: voice grade loops, xDSL-capable and xDSL-equipped loops. CLECs must obtain access to the DSLAM through an ATM switch, not directly to the DSLAM. Because DSLAMs will frequently be deployed at remote terminals where collocation is generally not possible (and because there is currently no other way for a CLEC to provision its own DSLAM functionality at the remote), a CLEC wishing to provide advanced services over a leased ILEC DLC loop likely will be forced to lease the entire xDSL equipped loop, including the DSLAM, transport to the ATM switch, and the switching function itself.

Although section 271(g)(2) permits the BOCs and their affiliates to provide "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools," the Commission must not take any action that would permit an ILEC to exercise monopoly power of its facilities or customers in any manner that prohibits access to

unbundled local loops or other network facilities used in the provision of advanced services. Until the BOCs open their local markets to competition, the Commission cannot consider granting them any form of interLATA relief. Any such relief would simply permit the BOCs to further monopolize data networks and advanced capabilities.

Similarly, the Commission must not grant LATA boundary modification to the BOCs. Contrary to their arguments, the BOCs are not the only companies that are committed to serving rural consumers. If the Commission continues to enforce the procompetitive requirements of section 251 of the Act, rural America will have many options from which to choose their advanced services providers. For any class of customers, the Commission is statutorily precluded from granting LATA modification if such change is the practical equivalent of forbearance from section 271 prior to full implementation of its requirements.

Indeed, no Commission action in the form of interLATA relief for the BOCs is needed to facilitate the deployment of advanced telecommunications capabilities and services. Indeed, section 10(d) of the Act -- the section of the Act that deals with forbearance and its applicable limitations -- expressly prohibits the Commission from forbearing from the application of the requirements of sections 251(c) and 271.

As the Commission and the telecommunications industry grapple with the many complex issues concerning advanced capabilities and services and how to meet the goals of section 706, MCI WorldCom proposes that the Commission examine the advantages presented by the creation of an advanced capabilities third-party administrator funded by the members of the advanced services industry. The industry-based third-party administrator will promote a fair, efficient and integrated approach to deploying advanced capabilities. In addition to

developing policy and overseeing dispute resolution, this administrator will be responsible for ensuring that competitors and potential new entrants receive access to those network elements required to provide advanced capabilities and services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF MCI WORLDCOM, INC.

MCI WorldCom, Inc. ("MCI WorldCom"),[1] by its attorneys, hereby files initial comments concerning the Memorandum Opinion and Order, and Notice of Proposed Rulemaking (Order or NPRM),[2] issued by the Commission on August 7, 1998, in the above-captioned proceeding.

I. INTRODUCTION AND BACKGROUND

MCI WorldCom, Inc. is one of the world's leading global telecommunications companies. Through its wholly-owned subsidiaries, MCI WorldCom provides its business and residential customers with a full range of facilities-based, fully integrated local, long distance, and international telecommunications and information services. In particular, MCI WorldCom currently is the second largest facilities-based interexchange carrier (IXC) in the United States, as well as a significant facilities-based competitive local exchange carrier (CLEC) and Internet service provider (ISP).

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[1] On September 14, 1998, WorldCom, Inc. ("WorldCom") merged with MCI Communications Corporation ("MCI") to form a new company, MCI WorldCom, Inc.

[2] ILECs are deploying xDSL and other advanced services throughout the United States. In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188, at ¶ 10 (rel. Aug. 7, 1998) (incumbent wireline carriers are today at the early stages of deploying advanced services).

MCI WorldCom commends this Commission for acknowledging that compliance by incumbent local exchange carriers (ILECs) with the local competition provisions of the Telecommunications Act of 1996 (1996 Act) is critical to the achievement of Congress's overriding goal -- greater choice, better quality service, and lower prices for local telephone consumers. The Commission's recent decision correctly concludes the requirements of section 251(c) apply to all network elements and telecommunications services provided by ILECs, whether the elements and services are characterized as "advanced." The Commission's additional findings are also correct. Advanced services are telecommunications services,[3] and local advanced service transmission technologies such as Digital Subscriber Line (DSL) service can be and are used to provide local exchange services.[4] Further, because the 1996 Act is technologically neutral, and thus section 251(c) is not limited to voice or conventional circuit-switched services, ILEC-provided advanced telecommunications capabilities and services must be subject to interconnection, unbundled network elements (UNEs), resale, and collocation obligations pursuant to section 251(c).[5] Finally, the Commission found that the application of LATA boundaries to Bell Operating Company (BOC) services -- in other words, the prohibition against BOC provision of in-region-interLATA services in section 271 -- cannot be forborne.[6]

MCI WorldCom also commends the Commission for instituting this rulemaking

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[3] NPRM ¶ 35-37.

[4] Id., ¶ 40-44.

[5] Id., ¶ 46-64.

[6] Id., ¶ 69-79.

proceeding. While, in MCI WorldCom's view, there is no statutory or policy basis for exempting ILECs from their obligations under section 251(c) when they provide advanced services via a nominally separate affiliate that is not treated as an ILEC itself, the Commission's obvious determination to ensure that CLECs and other competitors have an opportunity to compete with the ILECs in the provision of advanced capabilities and services must be commended. The Commission has correctly recognized that certain important rule modifications and clarifications are necessary in order to assure that CLECs obtain reasonable and nondiscriminatory access to the critical ILEC facilities, services and functionalities necessary to compete in the local market.

At the same time, the Commission must be exceedingly careful not to promulgate regulations that permit outcomes that foster the creation of an ILEC "digital monopoly" in the local market and impair the ability of CLECs to provide advanced capabilities. MCI WorldCom believes there is no foundation for the Commission's view that the ILECs do not enjoy potential or real market power over advanced services.[7] The ILECs' control over essential facilities -- including, but not limited to, loops and collocation space -- is a virtual guarantee of market power. Premature deregulation with respect to ILEC obligations, where no justification has been established for such an action, will largely negate the benefits of competition that consumers expect and deserve from advanced services. Instead, MCI WorldCom believes the better course is for the Commission to focus its efforts on establishing, implementing, and enforcing those rules that will ensure a fair opportunity for CLECs to enter the market for local voice and data

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[7] NPRM, ¶ 10.

services.

Having correctly found in the Order that ILECs are subject to the full range of obligations provided by section 251(c) when they provide advanced services, the Commission is now considering in the NPRM how best to promote competition in advanced services. In doing so, however, the Commission takes an unfortunate step back when it contemplates eliminating section 251(c) obligations for ILEC affiliates providing advanced data services. As explained below, we believe those proposed Commission actions are unnecessary, unlawful, unsupported, and contrary to the Act. However, if the Commission nevertheless decides to implement such a proposal, MCI WorldCom also provides proposed restrictions and safeguards to ensure that the resulting injury to local service competition is minimized to the extent possible.

II. THE COMMISSION LACKS LEGAL AUTHORITY TO ALLOW ILECS TO CIRCUMVENT THE SECTION 251(c) REQUIREMENTS BY PROVIDING LOCAL SERVICES USING ADVANCED CAPABILITIES THROUGH SEPARATE AFFILIATES

All of the ILECs currently provide, and have announced their intentions to continue provision, of local services using advanced capabilities as part of a complete product line that includes voice, data, and Internet services.[8] It is settled that network elements that ILECs use to provide advanced services are subject to the unbundling requirements of section 251(c)(3) and that advanced services provided by the ILECs are subject to the resale requirements of section

[8] See also Order Designating Issues for Investigation, In the Matter of Pacific Bell Telephone Company, CC Docket No. 98-103 (rel. Sept. 2, 1998), at ¶ 1 (describing Pacific Bell's ADSL offering in California). As explained below, broadband services provided using xDSL technology do not constitute a separate market, and other ILEC services using different technology are substitutes for them.

251(c)(4).[9] The Commission's proposal would allow the ILECs to avoid these unbundling and resale requirements by shifting functions that they would otherwise provide into a separate affiliate that is under common control and that provides local service using ILEC infrastructure, loops and other network elements. Countenancing such a shell game would violate the statutory prohibition against forbearance from the requirements of section 251(c) until the ILECs, or their successors or assigns, fully implement all those requirements. It would elevate form over substance contrary to the language, structure, and purpose of the Act.

A. Section 10(d) Prohibits the Commission From Forbearing, Directly or Indirectly, From Enforcement of All of the Requirements of Section 251(c)

As the Commission has recognized, it lacks legal authority to forbear from applying sections 251(c) and 271 to the provision of advanced services by ILECs: "Under section 10(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation." See Order, at ¶ 77. Not even the ILECs suggest that either section 251(c) or section 271 has been fully implemented. See ibid.

The Commission further concluded that section 706(a) does not constitute an independent grant of forbearance authority that overrides section 10(d). See Order at ¶ 69. Rather, section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage deployment of advanced services. See id. According to the Commission, sections 251(c) and 271 are the "cornerstones" of the framework Congress established in the Act to open local markets to competition. Id. at ¶ 73. Because these are the only two provisions that Congress expressly identified in limiting the

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[9] See Order and NPRM at ¶¶ 57, 58, 106 n. 206.

Commission's otherwise broad forbearance authority under section 10, it is "unreasonable" to conclude that Congress would have intended that section 706 allows the Commission to eviscerate those forbearance limitations. Id. at ¶ 76.

Applying section 10's explicit forbearance limitations, the Commission rejected the ILECs' request for large-scale changes in LATA boundaries. Id. at ¶ 82. The Commission concluded that this request is "functionally no different" from the incumbents' forbearance requests and is therefore prohibited by section 10(d). See id. (stating that "[i]t would exalt form over substance if we were to grant the requested large-scale changes in LATA boundaries."). According to the Commission, "[s]uch far-reaching and unprecedented relief could effectively eviscerate section 271 and circumvent the pro-competitive incentives for opening the local markets to competition that Congress sought to achieve in enacting section 271 of the Act." Id.

Despite its steadfast adherence to section 10's forbearance rules in other contexts, the Commission now suggests, through its separate affiliate proposal, to do indirectly what it correctly concluded section 10(d) of the Act expressly prohibits it from doing directly -- to forbear from applying the requirements of section 251(c) prior to their full implementation. Like the LATA boundaries modification suggestion, the separate affiliate proposal is the legal and practical equivalent of forbearance from section 251(c) and is, therefore, expressly prohibited under section 10(d).

B. An Affiliate Providing Advanced Services Should Be Subject to Section 251(c) as a Successor, Assign, and Comparable Carrier

In section 251(h), Congress prevented evasion of the requirements of 251(c) and the forbearance limitations in section 10(d) by defining "incumbent local exchange carriers" subject

to section 251(c) to include (1) any "successor or assign" and (2) any carrier that occupies a comparable position in the local market, that substantially replaced the ILEC, and for which ILEC treatment is consistent with the public interest. An ILEC therefore cannot escape its section 251(c) obligations by artificially shifting advanced functions to a separate affiliate under common ownership. NPRM at ¶ 93.

For all practical purposes, the affiliate contemplated in the Commission's proposal, even if nominally separate from the ILEC, would be a "successor" or "assign" of the ILEC and comparable in function and purpose. The affiliate would stand in the shoes of the ILEC, providing exactly the same advanced services that the ILEC was providing to customers before forming the affiliate, and that the ILEC would continue to provide if the separate affiliate did not provide a mechanism to avoid compliance with section 251(c). The only reason why the affiliate exists is to provide capabilities that the ILEC would otherwise provide and thereby to avoid the requirements of section 251(c). But for the prospect of avoiding section 251(c) requirements, the ILEC would own and operate the network elements and infrastructure, and provide the services, that the affiliate is created to provide. Clearly, the affiliate is "succeeding" to the ILEC's business and is "assigned" functions that the ILEC would otherwise perform, and it is therefore subject to section 251(c).

That conclusion is even more inescapable to the extent that the ILEC transfers any network elements to the affiliate. In the context of section 272, the Commission has interpreted the term "assign" to include, at a minimum, affiliates to whom a BOC "transfers . . . ownership of any network elements that must be provided on an unbundled basis pursuant to section

251(c)(3)."[10] The term "assign" should have the same meaning for purposes of section 251(h)(1)(B)(ii). See Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning."). Therefore, an advanced services affiliate of an ILEC must be deemed an "assign" of the ILEC if the ILEC transfers ownership to the affiliate of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) or uses any underlying infrastructure which the CLECs cannot use. Even a de minimis transfer of advanced services equipment and facilities from the ILEC to the affiliate makes the affiliate an "assign" of the ILEC.[11] Any such transfer, no matter if the equipment and facilities were purchased and installed by the ILEC or merely ordered by the incumbent but not installed, see NPRM at ¶ 108, would make the affiliate an "assign" of the ILEC under the Commission's own definition.

But even if the ILEC did not transfer any assets to the affiliate on a de minimis basis, MCI WorldCom contends that the affiliate would still be a successor and assign and a comparable carrier. If the ILEC simply scrapped the assets it had purchased and fired the employees it had hired to provide advanced services, the affiliate that provided advanced capabilities and services in its place would still be succeeding to its role, would still be assigned the same function in the corporate family, and would still occupy a comparable place in the local

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[10] See Non-Accounting Safeguards Order, ¶ 309 (emphasis added); see also id. at ¶ 105. Section 3(4), 47 U.S.C. § 153(4), defines a BOC to include "any successor or assign of such company that provides wireline telephone exchange service."

[11] The Commission rejected the BOCs' proposal that an affiliate "should only become a successor or assign if it 'substantially take[s] the place of the BOC in the operation of one of the BOC's core businesses'" or receives a "substantial transfer of network capabilities." Non-Accounting Safeguards Order at ¶ 303 (emphasis added). See id. at ¶ 309.

exchange market. The comparability of the ILEC and the affiliate is yet more ineluctable because the affiliate's services will likely carry voice as well as data traffic: xDSL and other advanced capabilities support both voice and data services; and convergence of voice and data services is likely only to accelerate. It would blink reality to suggest that an ILEC and its affiliate are not comparable when customers can use either carrier to make ordinary local voice calls. The fact that both the ILEC and its affiliate will provide the same types of services to the same customers using the loops owned and maintained by the ILEC confirms that the ILEC and its affiliate are, as a practical matter, equivalent.[12]

Moreover, section 251(h) was enacted against the background of, and should be interpreted consistently with, the Commission's long-standing policy of prohibiting companies from frustrating a congressional or regulatory policy by manipulating their corporate form. Indeed, consistent enforcement of that policy would preclude the ILECs from using an affiliate to avoid their section 251(c) obligations, and the Commission from condoning this stratagem, even if section 251(h) did not otherwise close this door. The Commission has historically looked through corporate form and treated separate corporate entities within a single corporate family as one and the same for purposes of regulation where a statutory purpose or policy would otherwise

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[12] It is inconceivable that an ILEC and its affiliate would actively compete against each other. The ILEC might continue providing advanced services to customers it signed up before it decided to serve additional customers through an affiliate in order to try to avoid further section 251(c) obligations. It would be unrealistic to expect either the ILEC or the affiliate to reduce local prices to capture new business from its sister company because their common shareholders would make less money if they did so. In this respect, advanced services affiliates of ILECs are no different from mis-named "ILEC CLECs" that provide a broader range of local service not limited to "advanced" local services. See Comments of MCI Telecommunications Corporation, CC Docket No. 98-39 at 4-7 (filed May 1, 1998).

be frustrated.[13] The Commission's policy is consistent with, and indeed compelled by, the refusal of federal courts to allow a company to defeat a statutory policy by shifting functions to different corporate entities under common ownership: courts have "consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 629-30 (1983); see Anderson v. Abbot, 321 U.S. 349, 362-63 (1944) ("It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.").[14] The Commission's separate affiliate proposal directly conflicts with this precedent because it would permit ILECs to create separate affiliates for the sole purpose of bypassing their obligations under section 251(c).

This conclusion is completely consistent with the Commission's conclusion in the Non-Accounting Safeguards Order,[15] that a BOC's section 272 affiliate formed to provide in-region

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[13] See General Tel. Co. of Southwest v. United States, 449 F.2d 846, 855 (5th Cir. 1971) (upholding Commission order prohibiting telephone companies from furnishing cable TV service in their telephone service areas either directly or through affiliates where anti-competitive practices also prohibited by order would be effected through the affiliate); Capital Tel. Co., Inc. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974) (holding that Commission validly pierced the corporate veil of corporate applicant for high-band radio-paging channel, and treated corporate applicant and its individual owner as one where Commission sought to be "fair, efficient and equitable" in granting radio licenses).

[14] This inquiry generally gives less deference to the corporate form than does the stricter common law alter ego doctrine. Leddy v. Standard Drywall, Inc., 875 F.2d 383, 387 (2d Cir. 1989); Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986).

[15] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 ¶ 312 (1996), recon. pending (subsequent history omitted) (Non-Accounting Safeguards Order).

interLATA service should not necessarily be deemed an ILEC solely because it also offers local exchange service.[16] Even if it were appropriate not to treat as an ILEC a BOC long-distance affiliate that provides local exchange service on a limited basis incidental to its primary long-distance business, it does not follow that an affiliate created to engage in a portion of the local exchange business in the ILEC's place should be exempted from the requirements of section 251(c). An affiliate whose core business comprises local telecommunications services that the ILEC would otherwise provide directly is plainly a successor and assign for the reasons discussed above. With respect to section 251(h)(2) concerning comparable carriers, while the long-distance affiliate primarily occupies a position in the market for interLATA services, the advanced services affiliate occupies a position in the market for telephone exchange service within the ILEC's territory that is comparable to the ILEC's position, and unlike the long-distance affiliate, the advanced services affiliate has substantially replaced the ILEC to that extent. The public interest calculus is substantially different for long-distance affiliates and local advanced services affiliates: a BOC is not permitted to provide interLATA services through an affiliate unless and until it has fully implemented the section 251(c)-based competitive checklist and facilities-based competition has developed; but the Commission's proposal in this proceeding would deprive CLECs of access to important xDSL-related network elements and advanced services at a wholesale discount even if no facilities-based or advanced services competition had emerged to put any significant pressure on the ILEC or its affiliate with respect

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[16] MCI has sought reconsideration of this decision. See Petition for Reconsideration of MCI Telecommunications Coroporation, CC Docket No. 96-149 (filed Feb. 20, 1997). The Commission has not acted on this petition.

to xDSL-capable loops, collocation, or advanced services on a retail or wholesale basis.[17]

C. Evasion of Section 251(c) Requirements Through a Separate Affiliate Would Frustrate the Procompetitive Purposes of the 1996 Act

Adoption of the Commission's separate affiliate proposal would inevitably frustrate the pro-competitive purposes and policies underlying section 251(c), which the Commission has acknowledged are "cornerstones" of the framework Congress established to open local markets to competition. See Order, at ¶ 73.[18] This is true for two reasons.

First, acceptance of the proposal would deny CLECs access to network elements and services on terms and conditions that permit them to bring competition to local markets faster. See Iowa Util. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997) (Congress included unbundled access and resale provisions "in order to expedite the introduction of pervasive competition into the local telecommunications industry"), cert. granted, 118 S. Ct. 879 (1998). As the Commission has recognized, it furthers the purpose of the 1996 Act to make elements and services available consistent with the requirements of section 251(c) when the ILEC provides them. It furthers the Act's purpose in the same way to make them available when the ILEC's affiliate provides them.

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[17] Moreover, the Non-Accounting Safeguards Order interpreted section 272, which expressly allows a section 272 affiliate to resell local exchange services. See 47 U.S.C.§ 272(g)(1). Here, no statutory language constrains the Commission's authority to treat an advanced services affiliate as an ILEC. In addition, the Non-Accounting Safeguards Order did not address the effect of the affiliate's use of the BOC's brand name or other things of value obtained from the BOC, and if the Commission allows the advanced services affiliate to use any such assets, the result would be different, for the reasons discussed below in Section V.B.

[18] The Commission has concluded that sections 251(c) and 271 apply to an ILEC's provision of advanced services. Id. at ¶¶ 11, 45, 52, 57.

Allowing an ILEC to avoid unbundling xDSL-related or any underlying infrastructure network elements even when denial of access would impair CLECs' ability to provide local telephone service would directly subvert the purpose of 251(c). ILECs need not make network elements available on an unbundled basis if the failure to provide access would not impair the ability of the requesting CLEC to provide competing services.[19] The ILECs do not contend that denial of access to xDSL-related elements would not impair the ability of CLECs to compete, as the Commission has defined impairment in regulations upheld by the Eighth Circuit. See Iowa Util. Bd. v. FCC, 120 F.3d at 810-12. If no such impairment existed, after all, the ILECs would not have to provide section 251(c) access to these elements when they owned and operated them. Just as it would impair the ability of CLECs to provide competing services if the ILEC did not provide unbundled access at cost-based rates to DSLAMs, it would impair their ability if they could not get such access from the ILEC's affiliate. That is why Congress forbade the Commission from forbearing from enforcing any of the requirements of section 251(c) until all of them were fully implemented.

Second, the separate affiliate approach would not prevent favoritism toward the separate affiliate. It is fanciful to think that the ILEC and its affiliate would operate in a truly independent fashion. After all, the ILECs' employees know that their common shareholders will be better off if the affiliate succeeds at the expense of its unaffiliated competitors, and both the affiliate and its competitors will depend on the ILEC for access to xDSL-related network elements. The affiliate

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[19] See 47 U.S.C. § 251(d)(2)(B); Implementing the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 ¶¶ 285-287 (released Aug. 6, 1998) (Local Competition Order).

will always benefit from its unique relationship with the ILEC and therefore have an unfair advantage over competing providers of advanced services. For example, both the affiliate and unaffiliated CLEC will need efficient, reasonable, and nondiscriminatory access to ILEC loops. If both the affiliate and a competitor simultaneously request from the ILEC provisioning of an xDSL-conditioned loop or its maintenance or repair, undoubtedly the affiliate will end up getting more favorable treatment. Performance reporting, performance standards, and self-executing remedies may reduce the extent of the discrimination or help to remedy its consequences, but they will not completely eliminate the problem. Moreover, the ILEC has no incentive to charge cost-based rates for the network elements associated with advanced services: as far as the shareholders of the ILEC and affiliate are concerned, any money paid by the affiliate to the ILEC returns to the same pot from which it came; but any money that competitors must pay the ILEC is real money spent as far as the competitor's shareholders are concerned.

As a result, the separate affiliate proposal would delay the introduction of competition to provide advanced services and undermine the policies and purposes of section 251(c). Consistent with the well-established practice of the Commission and the federal courts to treat two separate corporate entities as one in these circumstances, the Commission's adoption of this proposal would be unlawful.

D. The Structure of the Act Further Establishes the Unlawfulness of the Commission's Proposal

The structure of the Act provides further support for the conclusion that Congress did not intend to allow ILECs to escape their duty to comply with the market-opening provisions of section 251(c) by using a separate affiliate to provide services dependent on access to the ILEC